(1)

Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

DOUG CASS and ACTIVE APPLIANCE CORPORATION,

Petitioners,

v.

COUNTY OF SUFFOLK and COUNTY EXECUTIVE OFFICES OF CONSUMER AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is it violative of the Fourteenth Amendment to the United States Constitution for a state to procedurally limit a litigants right to access the courts by requiring multiple filing fees for the same proceeding?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Doug Cass and Active Appliance Corporation.

Pursuant to Supreme Court Rule 29.6 Active Appliance is a closely held private corporation and therefore no parent or publicly traded company owns 10% or more of the company's stock.

Respondents are the County of Suffolk, Suffolk County Executive and the Office of Consumer Affairs.

STATEMENT PURSUANT TO 28 U.S.C. § 451

Pursuant to 28 U.S.C. § 2403(b) certification to the State Attorney General due to the fact that the constitutionality of a state statute may be involved has been satisfied.

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Petitioners respectfully petition for a writ of certiorari to review the Order of the State of New York, Court of Appeals which denied Petitioners' motion to appeal a decision from the State of New York, Appellate Division, Second Department.

OPINIONS BELOW

The Supreme Court of the State of New York: County of Suffolk Memorandum, dated January 27, 1999 (App. B) and Judgment dated June 1, 1999 (App. C) granted respondents' motion for an order dismissing petitioners' special proceeding pursuant to Article 78 of the Civil Practice Law and Rules. The Supreme Court of the State of New York, Appellate Division: Second Department Decision and Order, dated May 15, 2000 (App. A) affirmed the Supreme Court. The State of New York, Court of Appeals, Order dated September 19, 2000 (App. D) denied petitioners' motion for leave to appeal.

STATEMENT OF JURISDICTION

The Order of the State of New York, Court of Appeals (App. D) was entered on September 19, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution (Due Process and Equal Protection) and New York Civil Law Practice Rules Section 304.

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

New York Civil Practice Law and Rules Section 304 states in pertinent part:

> An action is commenced by filing a summons and complaint or summons with notice. A special proceeding is commenced by filing a notice of petition or order to show cause and a petition. Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action. For purposes of this section, and for purposes of section two hundred three of this chapter and section three hundred six-a of this article, filing shall mean the delivery of the summons with notice, summons and complaint,

notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose together with any fee required as specified in rule twenty-one hundred two of this chapter for filing. Notwithstanding any other provision of law, such delivery may be accomplished by facsimile transmission or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, where and in the manner authorized by the chief administrator of the courts by rule. At the time of filing, the filed papers shall be date stamped by the clerk of the court who shall file them and maintain a record of the date of the filing and who shall return forthwith a date stamped copy, together with an index number, to the filing party.

STATEMENT OF FACTS

On November 21, 1997 Petitioners filed with the clerk of the Supreme Court for the State of New York, County of Suffolk an Order to Show Cause with a Petitioner's Affidavit in Support. The Order to Show Cause along with a Petitioners' Affidavit in Support sought to stay the revocation of Petitioner's license to engage in the appliance repair business pending judicial review. The filing of the Order to Show Cause and Petitioners' Affidavit in Support included the purchasing of an index number and Request for Judicial Intervention form by paying the requisite $170 and $75 filing fees, respectively, to the Clerk of the Court for the County of Suffolk. Thereafter, the Honorable Lester Gerard signed the Order to Show Cause which was promptly served upon Respondents that same day.

On November 24, 1997 Petitioner's filed an "Amended" Order to Show Cause which sought to commence an Article 78 proceeding with the clerk of the Supreme Court for the State of New York, Suffolk County. The Amended Order to Show Cause was simply an extension of the original filing. The purpose of the Article 78 proceeding was to have the Court decide the issue of the Respondents decision to revoke Petitioner's license on the merits. Each of the parties, the justice and issues were identical to the original Order to Show Cause which was in no way shape or form ever withdrawn or discontinued. The Amended Order to Show Cause was duly signed by Justice Gerard and timely served upon Respondents.

In response to receiving the Amended Order to Show Cause, Respondents moved the Court to Dismiss the special proceeding (action) based on the fact that it was not properly commenced since there was not a subsequent filing fee paid to the Court for the purchase of another index number.

The Supreme Court for the County of Suffolk, the Honorable Robert W. Doyle granted the motion by Respondents which was affirmed by the Appellate Division, Second Department. On motion for leave to appeal the decision of the Appellate Division by Petitioners, the Court of Appeals for the State of New York refused to grant certiorari.

STATEMENT OF THE CASE

Procedure To Commence An Action In New York

On July 1, 1992 New York went from what was known as commencement by service statue to what is currently known as a commencement by filing statute. Filing of either a Summons and Complaint with the requisite fee for the purchase of an index number or the filing of an Order to Show Cause with a Petition and the purchase of an index number is the crucial step needed to properly commence an action. Service of process upon the opposition must then be completed within the statutory period. *See Matter of Gershel v. Porr*, 89 N.Y.2d 327, 332 (1996). Only when a case is validly disposed of either by dismissal or by consent to withdraw may the Court consider an action dissolved. *Id.* Thereafter, if it chooses, it may reuse that index number for another matter.

Therefore the payment for an index number simultaneously with the filing of the order to show cause to the clerk of the court who then directs that the papers be taken to the desk of the Supreme Court Clerk for further processing constitutes commencement of a special proceeding. *Matter of Ryan v. Carlo*, 224 A.D.2d 804 (3d Dept. 1996).

REASONS FOR GRANTING THE WRIT

New York Commencement Procedure Violated Petitioner's Due Process Rights

The filing requirements for the commencement of a special proceeding in New York State under Civil Law Practice Rules Section 304 violated Petitioners' Fourteenth Amendment Due Process rights. Under current application of New York Law by the New York State Court of Appeals, a party to an action is required to pay the same filing fee twice without regard to past circumstances or the status of the current proceedings.

Similarly to the *Matter of Vetrone v. Mackin*, 216 A.D.2d 839 (3d Dept. 1995) where the Court held that an action had failed to be properly commenced according to New York State statute Civil Law Practice and Rules section 304, Petitioners' due process rights have been violated. In *Matter of Vetrone* Petitioner failed to pay the fee for a second index number when it re-filed a duplicate notice of petition and petition to simply correct the error of an absent return date.

In contrast, the Court of Appeals in *Matter of Gershel v. Porr*, held that a subsequent filing did not commence an action because of a failure to meet the statutory filing requirements. *Matter of Gershel v. Porr*, 89 N.Y.2d 327 (1996). However, this case is distinguishable to the case at bar. In *Matter of Gershel* Petitioner had withdrawn their original Order to Show Cause prior to it being dismissed by the Court on the basis of improper service upon the Respondent.

Here, Petitioners never withdrew their original Order to Show Cause nor was it ever dismissed. The filing of the original Order to Show Cause along with Petitioners' Affidavit in Support was when the proceeding was properly commenced. Petitioners' simply made an amendment to their original one in order to further comply with the statutory requirements. Even assuming arguendo, that the original filing did not meet the statutory requirements, surely the subsequent filing of the Amended Order, when combined with the original filing, clearly would have met the requirements as all of the essential elements and documents were more than provided. To say otherwise, because of the failure to pay a filing fee for something that has already been paid for, is a violation of Petitioners' due process rights and against the interests of justice.

CONCLUSION

In light of the great multitude of civil cases filed each year in the state of New York, the Court's decision regarding this matter will be far reaching. Each year many cases, which have merit, are dismissed based on procedural grounds for the failure of a litigant to pay a fee for something which has already been purchased. Here the New York Court of Appeals by denying Petitioners leave to appeal the decision of the Appellate Division for the Second Department has given approval to a procedure which is violative of ones Fourteenth Amendment Due Process rights.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MAY 15, 2000

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

1999-06474

In the Matter of Doug Cass, etc.,

appellant,

v

County of Suffolk, et al.,

respondents.

DECISION & ORDER

Argued — March 30, 2000

AD2d
WILLIAM C. THOMPSON, J.P.
WILLIAM D. FRIEDMANN
ANITA R. FLORIO
NANCY E. SMITH, JJ.

* * *

Appendix A

In a proceeding pursuant to CPLR article 78 to review a determination of the director of the Suffolk County Executive Office of Consumer Affairs, dated November 18, 1997, which, after a hearing, *inter alia*, revoked the petitioner's home appliance repair license, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Doyle, J.), entered June 1, 1999, which denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs.

The Supreme Court properly dismissed this proceeding because it was not properly commenced (*see*, CPLR 304, 403[b], 7804[c]). The petitioner's failure to include the petition in the original filing was a fatal jurisdictional defect that could not be cured by the subsequent filing of a notice of petition and petition without also purchasing a new index number (*see, Matter of Fry v. Village of Tarrytown*, 89 NY2d 714, 717; *Matter of Gershel v. Porr*, 89 NY2d 327, 332; *Matter of Vetrone v. Mackin*, 216 AD2d 839, 841).

THOMPSON, J.P., FRIEDMANN, FLORIO and SMITH, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

May 15, 2000

APPENDIX B — MEMORANDUM OF THE SUPREME COURT OF THE STATE OF NEW YORK, SUFFOLK COUNTY, PART V DATED JANUARY 27, 1999 AND FILED JANUARY 29, 1999

SUPREME COURT, SUFFOLK COUNTY
PART V

INDEX NO.: 1997-29421

In the Matter of the Application of DOUG CASS, ACTIVE APPLIANCE CORP.,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules in the nature of a certiorari,

– against –

COUNTY OF SUFFOLK, COUNTY EXECUTIVE OFFICES OF CONSUMER AFFAIRS,

Respondent.

BY: DOYLE, R.W., J.S.C.

DATED: January 27, 1999

MOTION DATE: 12-02-1997
SEQ. # 001-Art 78; #002-MSP;
#003-DISM; #004-X-Other
CDISPSUBJ

* * *

Appendix B

There are four applications in this proceeding pending before the Court. Initially, petitioner had moved by order to show cause for a temporary restraining order staying the revocation of petitioner's license. Thereafter, petitioner commenced an Article 78 proceeding seeking to annul a determination of the respondents and again requesting a temporary restraining order staying the revocations of petitioner's license. Respondents then moved to dismiss the petition upon the ground that it was not properly commenced. Finally, petitioner moved to "consolidate" the applications pending before the Court.

The petition herein seeks to review a determination of the Suffolk County Office of Consumer Affairs which revoked petitioner's license to engage in the business of appliance repair. Respondents seek dismissal of the proceedings upon the ground that they are a nullity, having not been properly commenced.

In this case, petitioner appears to have "commenced" this proceeding by purchasing an index number and submitting to the Court an order to show cause which sought to stay the revocation of petitioner's license. Sometime thereafter, petitioner served a notice of petition and petition upon respondents.

The Court of Appeals recently had reason to discuss the manner in which a special proceeding must be commenced.

> The procedure to commence a special proceeding, and its statutory prescribed sequence is, manifest from the terms of the commencement-by-filing

> statute: the petitioner must first purchase an index number and file with the court a notice of petition or order to show cause along with a petition, then effect service of the filed papers on respondent, and finally file proof of service with the court within the statutory period. (*Gershel v Porr*, 89 NY2d 327, 332, 653 NYS2d 82)

In that case, the Court of Appeals declared that the failure to comply fully with the statutory filing requirements, that is, to pay the filing fee and secure an index number, to file a notice of petition and petition, effect service, and file proof of service within the prescribed period required dismissal of the special proceeding. Here, as in that case, petitioner failed to properly commence the proceeding.

The paper which petitioner originally filed with the Court was the order to show cause seeking a temporary restraining order. No petition had been filed at that time and, therefore, there was no action or proceeding pending. As such, that request for relief would have to be considered a nullity since it was not made within the framework of either a pending action or special proceeding or one commenced simultaneously therewith. The subsequent attempt by petitioner to serve a notice of petition and petition also failed to comply with the statutory filing requirements. Since the order to show cause which purported to commence this proceeding was a nullity, the Court "was without authority to retain 'jurisdiction' over a proceeding in which jurisdiction over respondent had not been established . . ." (*Gershel v Porr*, 89 NY2d at p. 332, supra). Petitioner had the obligation to file the notice of petition and petition, pay a new filing fee and secure a new

index number (see *Matter of Vetrone v Mackin*, 216 AD2d 839, 628 NYS2d 866).

Accordingly, the motion by respondent for an order dismissing this proceeding upon the ground that it was not properly commenced is granted and the proceeding dismissed.

Submit judgment

s/ Robert W. Doyle
ROBERT W. DOYLE, J. S. C.

APPENDIX C — JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF SUFFOLK DATED MAY 17, 1999 AND ENTERED JUNE 1, 1999

At a Term, IAS Part V of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse located at 235 Griffing Avenue, Riverhead, New York on the 17th day of May, 1999.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Index No. 97-29421

In the Matter
DOUG CASS, ACTIVE APPLIANCE CORP.,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules in the nature of a certiorari.

– against –

COUNTY OF SUFFOLK COUNTY EXECUTIVE OFFICES OF CONSUMER AFFAIRS,

Respondents

JUDGMENT

Appendix C

The above named petitioner, DOUG CASS, ACTIVE APPLIANCE CORP. by its attorneys, Gramer & Associates, having attempted to commenced a proceeding under Article 78 of the Civil Practice Law and Rules for a judgment reviewing and annulling the determination of the respondent, the County of Suffolk, Office of Consumer Affairs revoking the petitioner's appliance repair license.

And the said proceeding having regularly come on to be heard before the Honorable Robert W. Doyle (J.S.C.), without a jury, at an Individual Assignment Part V of this Court, held at the Courthouse thereof, located at 235 Griffing Avenue, Riverhead, New York.

NOW, upon reading and filing the petitioner's the Order to Show Cause dated November 24, 1997; the Affirmation of Gary W. Gramer dated November 20, 1997; the Affidavit of Doug Cass dated November 20, 1997, and exhibits thereto; respondents' Affidavit of William Baessler dated December 4, 1997; the Affirmation of Derrick J. Robinson dated December 3, 1997, and exhibits thereto; the Respondents' Memorandum of Law dated December 4, 1997; the petitioner's Reply Affirmation of Gary W. Gramer dated December 22, 1997; the purported Verified Petition dated December 22, 1997; purported Notice of Petition dated December 22, 1997; the Respondents' Memorandum of Law dated January 23, 1998, and the Affirmation of Lee Wiedl, dated January 23, 1998, and exhibits thereto; and after due deliberation the Court having made and filed a Decision dated January 27, 1999, in favor of the respondents and against the petitioner

Appendix C

NOW, on motion of Lee Wiedl, Assistant County attorney for the respondent, County of Suffolk, County Executive offices of Consumer Affairs, it is

ORDERED, ADJUDGED AND DECREED, that the petitioner's application for relief pursuant to Article 78 of the C.P.L.R. is denied, and it is further

ORDERED, ADJUDGED AND DECREED that the proceeding is hereby dismissed with prejudice.

ORDERED, that Judgment be entered.

ENTER

s/ ROBERT W. DOYLE
ROBERT W. DOYLE, J.S.C.

APPENDIX D — ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR LEAVE TO APPEAL DATED SEPTEMBER 19, 2000

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth ***day of*** September 2000

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 792

In the Matter of Doug Cass, &c.,

Appellant,

v.

County of Suffolk, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court